Public Prosecutor v Chung Wan Li

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO 41–23 OF 2004-II
LAU BEE LAN J
23 AUGUST 2005

Criminal Law — Film Censorship Act 2002 — s 5(1) — Essential ingredients of offence — Whether prosecution had established a prima facie case

Criminal Procedure — Search — Search list — Effect of non-compliance with provision governing search list — Approach of court

The respondent was charged in the magistrate's court with an offence under s 5(1) of the Film Censorship Act 2002 for allegedly having in his possession 18 obscene VCD's. At the close of the prosecution's case, the magistrate discharged and acquitted the respondent without calling for his defence. The prosecution appealed.

Held, dismissing the appeal:

(1) The charge against the respondent under s 5(1) of the Film Censorship Act 2002 required proof of the following two essential ingredients: (a) the accused ('the respondent') was in exclusive possession at the material time, of the 18 obscene films in the form of VCD's; and (b) the 18 films were of obscene material. However, on the facts, an examination of the prosecution's evidence revealed uncertainties and doubts as to the identity of the 18 VCD's (see para 11).

(2) Non-compliance of the provision governing a search list merely casts doubt on the bona fides of the parties conducting the search. It then becomes incumbent on the trial judge to scrutinise the evidence further as to whether a prima facie case has made out. In the instant case, the identity of the 18 VCD's was central to proving that the accused had possession of them. The non-listing of each of the titles of the 18 VCD's greatly weakened the case for the prosecution (see paras 13–14).

(3) It was unsafe for the court to solely rely on PW5's evidence that he had conducted a screen test on all the 18 VCDs and that they were all obscene films since exh P5 which was prepared by him in respect of the 18 VCDs lacked evidential value. There was also a material contradiction as from whom he received the 18 VCDs. Therefore, the screening of all the 18 VCDs was necessary to determine whether they were obscene films. In the instant case, only four VCDs were screened but unfortunately, the titles of the four VCDs were not even identified. Thus, there was no evidence before the court as to which of the four VCDs out of the 18 VCDs were of obscene material. Neither was there proof whether the remaining 14 VCDs were of obscene material or otherwise. The permission granted by the magistrate to the prosecution to conduct a random screening of the VCDs was not tantamount to a waiver of

A the burden emplaced on the prosecution to prove each and every essential ingredient of the charge for purposes of establishing a prima facie case (see paras 16–18).

(4) The court could not invoke s 158 of the CPC and amend the charge to possession of four VCDs instead of 18 VCDs since the court was not satisfied B that the prosecution had proved beyond reasonable doubt that the respondent had in his possession the four VCDs and that they were obscene material (see para 21).

[Bahasa Malaysia summary

C

Responden dituduh di mahkamah majistret untuk kesalahan di bawah s 5(1) Akta Penapisan Filem 2002 kerana dikatakan memiliki 18 VCD lucah. Di penutup kes pihak pendakwa, majistret telah membebaskan dan melepaskan responden tanpa memanggil untuk pembelaannya. Pihak pendakwa mengemukakan rayuan.]

D

Diputuskan, menolak rayuan tersebut:

(1) Pertuduhan terhadap responden di bawah s 5(1) Akta Penapisan Filem 2002 menghendaki dua perkara penting: (a) tertuduh ('responden') mempunyai E kawalan eksklusif pada masa matan ke atas 18 filem lucah dalam bentuk VSC; dan (b) 18 filem tersebut berunsur lucah. Namun, berdasarkan fakta, satu pemeriksaan ke atas keterangan pihak pendakwa menunjukkan ketidaktentuan dan keraguan dalam mengenal pasti 18 VCD tersebut (lihat perenggan 11).

(2) Ketidakpatuhan peruntukan yang mengawal senarai carian hanya membentuk F keraguan ke atas kejujuran pihak-pihak yang mengendalikan carian tersebut. Ia menjadi kewajipan hakim perbicaraan untuk meneliti keterangan selanjutnya sama ada satu kes prima facie terbentuk. Dalam kes semasa, identity 18 VCD itu adalah penting dalam membuktikan bahawa tertuduh memilikinya. Tajuk-tajuk 18 VCD yang tidak tersenarai akan melemahkan kes pihak G pendakwa (lihat perenggan 13–14).

(3) Adalah tidak selamat untuk mahkamah bergantung semata-mata kepada keterangan PW5 bahawa beliau telah mengendalikan ujian pemeriksaan ke atas semua 18 VCD itu dan kesemuanya merupakan filem lucah memandangkan eskh P5 telah disediakan oleh beliau berkaitan 18 VCD itu yang kurang nilai H keterangan. Terdapat juga percanggahan ketara berhubung daripada siapa beliau terima 18 VCD itu. Oleh itu, pemeriksaan kesemua 18 VCD itu adalah perlu untuk menentukan sama ada ia adalah filem lucah. Dalam kes semasa, hanya empat VCD telah diperiksa tetapi malangnya, tajuk untuk keempat-empat VCD tersebut tidak disenaraikan. Oleh itu, tidak ada I keterangan di hadapan mahkamah yang menunjukkan antara empat VCD manakah daripada 18 VCD tersebut yang merupakan bahan lucah. Tiada juga bukti menunjukkan sama ada 14 VCD yang lain itu bahan lucah atau sebaliknya. Kebenaran yang diberikan oleh majistret kepada pihak pendakwa untuk mengendalikan pemeriksaan rawak terhadap VCD tersebut tidak sama seperti satu penepian beban yang diletakkan ke atas pihak pendakwa untuk

membuktikan setiap satu perkara yang penting dalam pertuduhan bagi tujuan mengemukakan satu kes prima facie (lihat perenggan 16–18).

(4) Mahkamah tidak boleh menggunakan s 158 Kanun Acara Jenayah dan meminda pertuduhan milikan empat VCD dan bukan 18 VCD memandangkan mahkamah tidak berpuas hati bahawa pihak pendakwa telah membuktikan melampaui keraguan munasabah bahawa responden memiliki empat VCD dan merupakan bahan yang lucah (lihat perenggan 21).

Notes

For cases on Film Censorship Act 2002 s 5(1) generally, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1–2869.

For cases on search generally, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3041–3053.

Cases referred to

San Soo Ha v PP [1968] 1 MLJ 34 (refd)

Legislation referred to

Criminal Procedure Code ss 64, 158
Film Censorship Act 2002 ss 5(1), 36

Appeal from: Summons No M–87–30 of 2003-C (Magistrate's Court, Kuching)

Syarifuddin bin Hj Abdul Rasa (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.

Siew Chen Fui (Awang Chua Voon Ting Ronald & Co) for the respondent.

Lau Bee Lan J:

[1] The Public Prosecutor ('PP') has appealed against the order of the learned magistrate made on 14 September 2004 in discharging and acquitting the respondent without calling for his defence.

[2] The respondent (accused in the court below) Chung Wan Li was charged with the following amended charge:

> Bahawa kamu pada 18 November 2002, jam lebih kurang pukul 3:00 petang bertempat di BEST MULTI COMMUNICATION, NO 889, TABUAN JAVA SHOPPING CENTRE, 93500 KUCHING, SARAWAK didapati ada memiliki sebanyak 18 keping filem dalam bentuk VCD pelbagai tajuk yang didapati lucah dan dengan demikian kamu telah melakukan kesalahan di bawah s 5(1) Akta Penapisan Filem 2002, dan jika sabit kesalahan boleh dihukum di bawah s 5(2)5 Akta yang sama.

[3] The PP has appealed upon four grounds that I shall deal with accordingly.

FIRST GROUND

[4] In respect of the first ground, it is the prosecution's contention that the learned magistrate erred in law and in fact in coming to the conclusion that there is doubt on the identity of the exhibits seized (PI) based on the following grounds:

(i) no record of proof ('first point');

(ii) some of the exhs PI, the title was in Chinese character, thus PW1, PW2 and PW3 cannot be so sure that the title in exh P2 was similar to the exhibits they seized ('second point'); and

(iii) since En Elias was not called to testify, it is not safe to conclude that the 18 obscene VCD (video cakera padat) received by PW5 was the same as that seized by PW1 and his colleagues ('third point').

[5] In respect of the first point, the learned DPP submitted that the learned magistrate has erred because he himself allowed the random testing of 18 VCDs upon the application of the Prosecuting Officer as is evident from the following evidence:

PO: Pohon uji tayang secara random

Court: Proceed

Court: The screening has been done.

[6] In respect of the second point, the prosecution submitted that the learned magistrate erred because exh P2, the Search List No 000172 dated 18 November 2002 was acknowledge by the accused himself.

[7] In relation to the third point, the prosecution contended there was no necessity to call En Elias bin Mat Rabi because there was no need for corroboration and the accused was not prejudiced in any event because En Elias was not a member of the raiding team.

[8] On the other hand, in rebuttal to the first point, Mr Roger Chin submitted that it was incumbent for the prosecution to prove each and every ingredient of the charge, ie one of which is that the 18 VCDs must be confirmed to be obscene. He argued that no explanation was proffered for the Prosecuting Officer's application to carry out random sampling of the VCDs and neither should the learned magistrate be faulted for conceding to their application, as it is not the learned magistrate's duty to teach the prosecution as to the proper procedure to adopt.

[9] In respect of second point, Mr Roger Chin submitted that notwithstanding that exh P2 was acknowledged by the accused, the titles of the 18 VCDs were not listed rendering the identity of 18 VCDs seized from the Accused to be uncertain.

[10] For the third point, Mr Roger Chin submitted that the failure of the prosecution to call En Elias leaves the prosecution's evidence in a state of great doubt and further, it cannot be said that the accused was not prejudiced because there was a serious break in the chain of evidence as there is doubt as to who handed the 18 VCDs to the Investigating Officer, Raja Husin bin Raja Ibrahim (PW5). A

[11] I am of the view that the submission of the learned DPP in respect of the first ground comprising the first to the third points is without merit. The charge preferred against the accused under s 5(1) of the Film Censorship Act 2002 ('the Act') requires proof of two essential ingredients: B

(a) the accused was in exclusive possession at the material time, ie 3pm on 18 November 2002 of the 18 obscene films in the form of VCD; and C

(b) that the 18 films are of obscene material.

[12] An examination of the evidence adduced by the prosecution, as pointed out in the written submission of the defence (encl 8), is tainted with uncertainty and grave doubt as to the identity of the 18 VCDs because: D

(i) Exhibit P2, the 'Pengakuan Rampasan' form (search list) failed to list the titles of each and every one of the 18 VCDs allegedly seized by the Kementerian Dalam Negeri (KDN) officers on 18 November 2002, the date the raid was conducted at accused's shop; thus rendering the identity of the 18 VCDs in doubt; E

(ii) PWl, Yusri bin Hajudin, one of the members of the raiding team testified that after seizing exh PI, he handed them to PW5 whereas PW5 testified that he received exh PI from En Elias bin Mat Rabi (not called as witness). Hence, there is a serious contradiction as to whether the 18 VCDs which PWl handed to PW5 were indeed the same ones that were handed by En Elias to PW5 since exh P2, the search list prepared by PWl had not contained a description of each and every title of the 18 VCDs seized, but merely stated 'MS Keping VCD Pelbagai Tajuk. F

In addition to the above, I am of the view that there are other factors raised by the defence, which ought to have been given weight to also, although not mentioned in the petition of appeal, namely: G

(iii) Exhibit P5, the list of 18 VCDs prepared by PW5,1 agree, lacks evidential value as it was not prepared at the place of seizure.

(iv) It is also relevant to consider that the prosecution's evidence revealed that PWl, PW2, Joseph Tiang ak Setu and PW3, Atom ak Peter (the photographer) testified that they seized 18 VCDs from the accused on 18 Novemer 2002 whilst PW4, Ezian bin Sobeng, the KDN officer who impersonated as a customer and who allegedly purchased VCDs from the accused, testified that the raiding team only seized the five VCDs which he had brought back to the accused's shop for exchange at the material time. This is evident from PW4's testimony during examination-in-chief at p 15 of the record of appeal, lines 24–29) as: H I

Masuk kedai tertuduh 2.35 petang.

Dari masuk hingga seterusnya, masuk dan ingin tukar VCD tersebut, katakan penukaran dibuat soya memberi isyarat kepada anggota lain untuk masuk menyerbu.

Ya, VCD lucah yang ada pada tertuduh hanyalah lima keping pada masa itu.

Yang tangkap tertuduh: Yusri Hajudin, Joseph Tiang ak Setu, Atom ak Peter, Abd Basir.

And further at p 16 of the record of appeal, lines 15–20:

Ingin membuat penukaran, serah VCD 5 keping kepada tertuduh. I open the plastic. I the one 'who bring these lima VCD to the shop.

Selepas buka plastik soya tunjukkan kepada OKT, toleh ke belakang dan tunjuk isyarat dan mereka pun masuk.

Setuju, pegawai KDN ambil lima keping VCD tersebut. Senarai rampasan soya tak pasti.

From the aforesaid evidence, the court is again left in a state of uncertainty and doubt as to whether the number of VCDs seized from the Accused were 5 or 18 in number.

Furthermore, the court is left in a state of doubt as to whether the five VCDs brought to the accused's shop to be exchanged belonged to PW4 or the accused in the light of the following evidence. PW4 testified that he purchased five VCDs from the accused three days before the raid (15 November 2002). Notwithstanding that PW4 said that he kept the five VCDs in a locked locker, however he admitted that he did not prepare any search list listing the titles of the said five VCDs purchased because the case was under investigation, neither were the titles of the five VCDs recorded in his ID and he candidly admitted that he did not hand them over to the Investigating Officer because the investigation was not completed and what he did with the five VCDs, nobody would know. To make matters worse, there is no proof of purchase in the form of any receipt.

(v) Lastly, the issue of non-compliance of s 36 of the Act. Section 36 of the Act states:

36(1) Where any seizure is made tinder this Part, the Enforcement Officer or police officer making the seizure shall prepare a list of every film, film-publicity material, book, document or other thing seized and of the place in which it is found and shall sign the list.

The defence had cited a dictum from Raja Azlan Shah (as his Highness then was) in the case of *San Soo Ha v Public Prosecutor* [1968] 1 MLJ 34 wherein at p 36, his Lordship opined:

In my view, the provisions of the section are to be strictly followed by the extent it is possible to ensure that the incriminating articles obtained as a result of the search were recovered as alleged and leaves no room for doubt and to exclude the possibility of any concoction or malpractice of any kind.

[10] For the third point, Mr Roger Chin submitted that the failure of the prosecution to call En Elias leaves the prosecution's evidence in a state of great doubt and further, it cannot be said that the accused was not prejudiced because there was a serious break in the chain of evidence as there is doubt as to who handed the 18 VCDs to the Investigating Officer, Raja Husin bin Raja Ibrahim (PW5). A

[11] I am of the view that the submission of the learned DPP in respect of the first ground comprising the first to the third points is without merit. The charge preferred against the accused under s 5(1) of the Film Censorship Act 2002 ('the Act') requires proof of two essential ingredients: B

(a) the accused was in exclusive possession at the material time, ie 3pm on 18 November 2002 of the 18 obscene films in the form of VCD; and C

(b) that the 18 films are of obscene material.

[12] An examination of the evidence adduced by the prosecution, as pointed out in the written submission of the defence (encl 8), is tainted with uncertainty and grave doubt as to the identity of the 18 VCDs because: D

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In addition to the above, I am of the view that there are other factors raised by the defence, which ought to have been given weight to also, although not mentioned in the petition of appeal, namely: G

(iii) Exhibit P5, the list of 18 VCDs prepared by PW5,1 agree, lacks evidential value as it was not prepared at the place of seizure.

(iv) It is also relevant to consider that the prosecution's evidence revealed that PWl, PW2, Joseph Tiang ak Setu and PW3, Atom ak Peter (the photographer) testified that they seized 18 VCDs from the accused on 18 Novemer 2002 whilst PW4, Ezian bin Sobeng, the KDN officer who impersonated as a customer and who allegedly purchased VCDs from the accused, testified that the raiding team only seized the five VCDs which he had brought back to the accused's shop for exchange at the material time. This is evident from PW4's testimony during examination-in-chief at p 15 of the record of appeal, lines 24–29) as: H I

[16] Under the second ground, in my view, it would be unsafe for the court to solely rely on PW5's evidence that he had conducted a screen test on all the 18 VCDs and that they were all obscene films because I find that exh P5 which was prepared by him in respect of the 18 VCDs handed to him lacked evidential value and besides there was a material contradiction as from whom he received the 18 VCDs (discussed earlier).

[17] Therefore, the screening of each and everyone of the 18 VCDs is necessary to determine whether they were obscene films becomes critical. Here as per the finding of the learned magistrate not only were only four VCDs screened but unfortunately the titles of the four VCDs were not even identified. Hence, there is no evidence before the court of which of the four VCDs out of the 18 VCDs exh PI (A–R) were of obscene material and neither was there proof whether the remaining 14 VCDs were of obscene material or otherwise.

[18] I agree with the defence that the learned magistrate should not be faulted just because he had allowed the prosecution's application to conduct random screening. In my opinion, the permission granted by the learned magistrate is not tantamount to a waiver of the burden emplaced on the prosecution to prove each and every essential ingredient of the charge for purposes of establishing a prima facie case. It is the duty of the prosecution throughout to establish a prima facie case and it is not for the learned magistrate, as pointed out by the defence, to tell them as to the correct procedure to be adopted.

THIRD GROUND

[19] Under the third ground, the prosecution contended that the learned magistrate had erred in law and in fact when he considered failure to prove which one of the items seized is obscene is a fatal blow to the prosecution's case.

[20] In my view, this third ground is intertwined with the second ground above and therefore I do not propose to deal with it again.

FOURTH GROUND

[21] Basically under the fourth ground, the prosecution is urging the court to invoke s 158 of the CPC and to amend the charge to four VCDs instead of the current 18 VCDs. Here, I am in agreement with the defence that this ground cannot be sustained. To amend the charge to possession of the four VCDs entails the court to be satisfied that a prima facie case has been made out, ie the prosecution has proved beyond reasonable doubt that the Accused had in his possession the four VCDs and that the four VCDs was of obscene material. However, as I have explained earlier this is woefully lacking.

CONCLUSION

[22] or all the foregoing reasons, I find there are no grounds for me to interfere with the findings of the learned magistrate. I affirm the decision of the learned

Following this passage the defence had based on s 36 of the Act which provides that where any seizure is made, the Enforcement Officer making the seizure shall prepare a list of every film, submitted the importance of complying with the mandatory requirement of preparing a search list.

On this issue, with due respect to both Mr. Siew Chen Fui and Mr Roger Chin, I find that they have not quoted the relevant passage in *San Soo Ha*'s case in toto and therefore they have misconstrued what was the ratio decidendi. The issue before the learned judge then was whether the accused was prejudiced as the search officer had failed to prepare a search list in compliance with s 64 of the Criminal Procedure Code ('CPC'). Apart from the passage quoted above, the learned judge further said:

> This section bears some resemblance to s 103 of the Indian Criminal Procedure Code which is more exhaustive than ours. *Conviction or acquittal of an accused person invariably depends upon the credibility of witnesses as assessed by the trial court and never on the question whether a particular legal procedure has been compiled with. The most that can be said about the failure to comply with the provision relating to search list is that it may cast doubt upon the bona fides of the parties conducting the search and accordingly afford ground for scrutiny*; but if after close scrutiny the court arrives the conclusion that the stolen articles were recovered from the possession of the accused person, it is obviously no defence to say that the evidence was obtained in an irregular manner. There is nothing in the law which makes such evidence inadmissible (see *Bashir v Emperor* AIR 1932 All 185; *Bhattacharjee v Emperor* AIR 1940 Cal 85). In the present case, the learned president had explored the evidence and came to the conclusion that the stolen articles were recovered from the possession of the appellant. I am therefore unable to see how the failure to prepare a search list by itself would entitle the appellant to an acquittal. (Emphasis added.)

[13] Based on the emboldened portion taken from the passage quoted above, the principle to be gleaned is the effect of non-compliance of the provision governing a search list merely cast doubt on the bona fides of the parties conducting the search and it then becomes incumbent on the trial judge to scrutinise the evidence further whether a prima facie case has made out.

[14] In the context of the present case, the identity of the 18 VCDs is central to proving that the accused had possession of them and the absence of the listing of each of the titles of the 18 VCDs greatly weakens the case for the prosecution.

SECOND GROUND

[15] Under the second ground, the prosecution submitted that the learned magistrate had erred in law and in fact when he came to his finding that the prosecution has failed to prove that all of exh PI, ie the remaining 14 VCD (video cakera padat) seized are obscene films and disregarded PWS's evidence that the result of a screen test conducted on the seized items has shown that all these items are obscene films.